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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion to Assess and Revise
the Regulation of Telecommunications Utilities.

Rulemaking 05-04-005
(Filed April 7, 2005)
(Phase 2)

Order Instituting Rulemaking for the Purposes of
Revising General Order 96-A Regarding Informal
Filings at the Commission.

Rulemaking 98-07-038
(Filed July 23, 1998)

**ASSIGNED COMMISSIONER'S AND
ADMINISTRATIVE LAW JUDGE'S RULING**

Pursuant to the Assigned Commissioner's Ruling dated August 6, 2007 ("Ruling"), this Ruling is issued to set the issues, scope, and schedule for hearings on the issues raised by protests to the Pacific Bell Telephone Company dba AT&T California (AT&T) Advice Letters 28800 and 28982.

Background

Commission Resolution No. L-33 and the December 21, 2006 Assigned Commissioner's Ruling and Revised Scoping Memo indicated to those in this docket and the consolidated complaint Case (C.) 98-04-004 that the impact of AT&T Advice Letters 28800 and 28982 "Rule 12 Advice Letters" would be consolidated in Phase 2 to this proceeding.¹ On August 6, 2007, the Assigned

¹ Resolution No. L-399 therefore consolidated the issues raised by the protests to AT&T's Advice Letters 28800 and 28982 into the URF proceeding.

Commissioner's Ruling granted TURN's request for evidentiary hearings on the issues raised by protests to the Rule 12 advice letters. The Ruling sought comment from the parties on the scope of issues to be addressed in the hearings on the AT&T Rule 12 Advice Letters. In the Ruling, we found that AT&T's Rule 12 Advice Letters are in substance equivalent to a petition to modify a prior Commission decision. On that basis, the Ruling found that AT&T has the burden of proving that its Rule 12 Advice Letters should remain in effect. Comment was sought on the scope of issues and set forth the following tentative scope of issues:

1. Whether the changed market conditions or any other events subsequent to the issuance of D.01-09-058 (including the findings of the URF Phase I decision) support the modifications made by the AT&T Rule 12 Advice Letters.
2. The relationship between the modifications to Tariff Rule 12 made by the Rule 12 Advice Letters and D.01-09-058 and subsequent decisions or resolutions modifying D.01-09-058.
3. Whether AT&T has reformed its processes and procedures to ensure that the abuses found in C98-04-004 do not occur.
4. The impact of AT&T's removal of the disclosure language in its Rule 12 tariff on consumers.

DRA/TURN filed joint comments, and Latino Issues Forum's comments were limited to endorsing in their entirety the DRA/TURN joint comments. AT&T also filed comments on the Ruling. In their comments, both DRA/TURN and AT&T take issue with the way the Ruling frames the questions for decision in this case but in different ways.

DRA/TURN Comments

DRA/TURN cite Commission Rule 16.4(b), which sets out the burden of proof that must be met by a party seeking to modify a prior Commission

decision, and argue that AT&T must make a specific showing that the conditions that led to the complaint and D.01-09-058 no longer apply.² By “the conditions” DRA/TURN appear to refer to the marketing practices that led the Commission in 2001 to impose the Rule 12 requirements in the first place in D.01-09-058.

DRA/TURN argue further that the Ruling has misstated the object of proof: AT&T should not have to prove that its advice letters should remain in effect. Instead, DRA/TURN assert, AT&T must prove that its modification of the conditions imposed in D.01-09-058 through its Rule 12 Advice Letters is justified and will not impede or diminish the “just and reasonable” utility service required by Pub. Util. Code § 451.³ More specifically, DRA/TURN argue that AT&T must “demonstrate that changed market conditions are sufficient to have caused it to overhaul its marketing behaviors and that those modifications are irreversible. In particular, AT&T must demonstrate how new market conditions themselves ensure that AT&T will not ... do things like up-sell more costly bundles than customers need, fail to disclose its least cost service alternatives in all customer marketing contacts, sell services before addressing customer requests, or sell services with deceptive names or product descriptions.”⁴

² Joint Comments of the Division of Ratepayer Advocates and The Utility Reform Network on Assigned Commissioner’s Ruling on Hearings, August 17, 2007 (DRA/TURN Joint Comments) p. 2.

³ DRA/TURN Joint Comments at pp. 2-3. “All charges demanded or received by any public utility...for any service rendered or to be rendered shall be just and reasonable.” See also D.01-09-058 Conclusion of Law 3 (“Charges obtained by means of misleading or confusing sales tactics are unjust and unreasonable”).

⁴ DRA/TURN Joint Comments p. 3.

DRA/TURN also argue that even if changed market conditions were assumed to be relevant to this case -- an assumption that they dispute -- the Commission cannot rely on the competition findings made in the first phase of this proceeding to support a decision in favor of AT&T's modifications of its Rule 12 Tariff. In effect, they argue, those findings which applied to entire markets for telecommunications services are not granular enough to be applied to the specific sub-markets with which D.01-09-058 was concerned, which DRA/TURN describe as "consumers who have retained their landlines, and particularly low-income, elderly, and non-English speaking populations most vulnerable to aggressive marketing."⁵

Finally, DRA/TURN also dispute the value of looking into the impact of the Rule 12 Advice Letters on AT&T's customers (Issue 4), arguing that AT&T is unlikely to implement its Rule 12 Advice Letters until this proceeding has been resolved and therefore, a lack of spike in complaints against AT&T in the past year would not be dispositive of the impact of the Rule 12 Advice Letters.⁶

AT&T Comments

AT&T argues that Issue 3 should be removed from the scope of this proceeding because no one has ever suggested that AT&T failed to implement the conditions imposed in D.01-09-058. "It would be fundamentally unfair," AT&T argues, "to turn issues dealing with the prospective application of AT&T's

⁵ DRA/TURN Joint Comments p. 7.

⁶ *Ibid.*, p. 8.

advice letters into a *de facto* enforcement proceeding.”⁷ AT&T asserts that it makes no sense to review AT&T’s processes and procedures over the past decade, on grounds that this type of inquiry has no relationship to the advice letter changes.⁸

AT&T also disputes the categorization of this proceeding as adjudicatory and that such a recategorization is unnecessary and unwarranted and should be reversed.⁹

Discussion

Scope of Issues

Other than a slight modification to Issue 1, we retain the scope of issues proposed in the Assigned Commissioner’s Ruling of August 6.

We agree with the comments of DRA/TURN that AT&T must comply with Commission Rule 16.4(b), meaning AT&T bears the burden of proof to modify our past decision D.01-09-058. We reject, however, DRA/TURN’s argument that Issue 1 should be excluded from the scope or reframed consistent with their recommendations. Changed circumstances or facts may provide justification for modifying a prior Commission decision.¹⁰ We modify Issue 1 slightly to remove the reference to “changed market conditions.” We also reject

⁷ Comments of Pacific Bell Telephone Company d/b/a AT&T California (U 1001 C) on Assigned Commissioner’s Ruling on Hearings and Ex Parte Ban, August 17, 2007 (AT&T Comments), p. 2.

⁸ AT&T Comments at p. 2.

⁹ *Ibid.*, p. 3.

¹⁰ See Rule 16.4(b).

DRA/TURN's assertion that Issue 4 should be excluded from the scope as inconsistent with the remainder of their comments.

The remaining DRA/TURN arguments regarding Issues 1 and 4, however phrased, go to the question of what AT&T must prove to keep its Advice Letters in effect. DRA/TURN argue that lack of evidence of customer complaints since AT&T filed its Rule 12 Advice Letters does not demonstrate that the Rule 12 Advice Letters may stay in effect. DRA/TURN argue that AT&T must prove either (1) that the existence of a competitive telecommunications market is sufficient by itself to irrevocably eliminate the marketing conditions that were the subject of D.01-09-058; or (2) that in the absence of the Tariff Rule 12 requirements removed by the Advice Letters, AT&T will not engage in the proscribed conduct.

Issues 1 and 4 are relevant to the determination of whether the underlying decision D.01-09-058 may be modified. A petition for modification imposes on the petitioner the burden of demonstrating that the requested modification to the decision should be made. AT&T may produce such evidence as it believes will support the modification. AT&T may choose to include as part of that evidence information relative to changes in the market that provide consumers with alternatives that may not have been available to them at the time D.01-09-058 was adopted. DRA/TURN may also choose to introduce evidence that a competitive market alone is insufficient to provide adequate protection to the particular classes of consumers or against the particular forms of marketing abuse considered in D.01-09-058. Such information may or may not be conclusive but it is relevant. As for evidence relating to the impact of the Rule 12 Advice Letters on consumers, we believe that it is a legitimate area of inquiry to

determine whether there may be positive or negative impacts on consumers with the removal of the language at issue.

With regard to AT&T's arguments regarding Issue 3, this issue is intended to determine whether there have been changed facts or other justifications for modifying its Tariff 12. Such facts or circumstances could include changes that AT&T has made to its marketing practices that would indicate that the marketing practices found to be abusive in the underlying decision D.01-09-058 would not occur on a prospective basis. Accordingly, this issue is not necessarily intended to review AT&T's past compliance with the requirements/conditions of D.01-09-058, but intended to determine whether there have been changed facts or other justifications for modifying the Advice Letters and the underlying enforcement decision. Evidence about whether AT&T has or has not complied with past requirements between the date D.01-09-058 and the date of the advice letter filings may also be relevant, but we clarify that this is not the intended focus of this proceeding.

Ex Parte Ban

AT&T has incorrectly presumed that we have recategorized the proceeding as adjudicatory. We have not recategorized the proceeding. Because of the controversial and potentially contentious nature of the issues involved, we are imposing a proceeding-specific ex parte ban on all communications surrounding issues regarding AT&T Rule 12 Advice Letters and Ordering Paragraph 21 of D.06-08-030. This proceeding will, however, remain categorized as quasi-legislative. Moreover, as noted in the August 6 Ruling, AT&T's Advice Letters are substantively equivalent to a petition for modification; therefore, the burden of proof is on AT&T to demonstrate that the underlying decision should

be modified to remove the language in Rule 12 of the tariff (consistent with the advice letters).

Schedule

Given the scheduling conflicts noted by DRA/TURN for the earlier tentatively scheduled dates of November 5-6, we are rescheduling the evidentiary hearings for Monday and Tuesday, 10:00 a.m., November 19 and 20, 2007, at the Commission's hearing rooms, State Office Building, 505 Van Ness Avenue, San Francisco. If necessary, an additional day of hearings will be subsequently scheduled. The schedule for serving testimony is as follows:

- October 1, 2007: AT&T serves written testimony and exhibits with a copy to the assigned Commissioner and the ALJ
- October 22, 2007: DRA/TURN serve responsive testimony and exhibits with copy to the Assigned Commissioner and ALJ
- October 29, 2007: AT&T serves rebuttal testimony and exhibits with copy to the assigned Commissioner and ALJ

Discovery

Parties have the right to conduct discovery into any relevant matters. We encourage parties to conduct discovery on an expedited basis in consideration of the tightness of the schedule. Discovery motions, if any, will be ruled on by the assigned ALJ.

IT IS RULED that:

1. The scope of the proceeding is as set forth below.
 - a. Whether any events subsequent to the issuance of Decision (D.) 01-09-058 support the modifications made by the AT&T Advice Letters.

- b. The relationship between the modifications to Tariff Rule 12 made by the Rule 12 Advice Letters and D.01-09-058 and subsequent decisions or resolutions modifying D.01-09-058.
 - c. Whether AT&T has reformed its processes and procedures to ensure that the abuses found in C.98-04-004 do not occur.
 - d. The impact on consumers of AT&T's removal of the disclosure language in its Rule 12 tariff.
- 2. The schedule for this proceeding is as set forth herein.
 - 3. The proceeding remains quasi-legislative and hearings are necessary.
 - 4. There is a proceeding-specific ex parte ban on communications regarding the Rule 12 Advice Letters and Ordering Paragraph 21 of D.06-08-030.

Dated September 11, 2007, at San Francisco, California.

/s/ RACHELLE B. CHONG

Rachelle B. Chong
Assigned Commissioner

/s/ KARL J. BEMESDERFER

Karl J. Bemederfer
Administrative Law Judge

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a Notice of Availability of the filed document to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the Notice of Availability of the filed document is current as of today's date.

Dated September 11, 2007, at San Francisco, California.

/s/ FANNIE SID

Fannie Sid